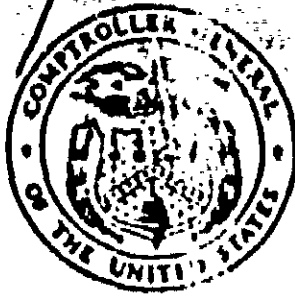


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DECISION



21201
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FIL#: B-204410

DATE: March 18, 1982

MATTER OF: Doris M. Carlino - Waiver - Living Quarters Allowance

DIGEST: Civilian employee of Air Force was erroneously paid \$10,812.39 Living Quarters Allowance. The employee received \$4,495.42 of the allowance under a mistaken, good faith belief that she was entitled to it. The remaining \$6,316.97 was received after she was notified that her eligibility was in doubt. The claim for sums paid prior to notice was properly waived under the authority of 5 U.S.C. § 5584 (1976). The claim for sums paid after notice may not be waived because the employee knew that she might be ineligible and should have set the sum aside for possible refund.

This is an appeal from our Claims Group's determination that only \$4,495.42 of \$10,812.39 Living Quarters Allowance (LQA) erroneously paid to a civilian employee of the Air Force may be waived under 5 U.S.C. § 5584 (1976). The issue is whether an employee who was notified that her eligibility for LQA was in doubt, is entitled to waiver of the LQA received subsequent to that notice. Since the subsequent allowances were received after the employee knew she might not be entitled to them and might have to refund them to the Government, they may not be waived.

Facts of the Case

On April 11, 1976, Mrs. Doris M. Carlino, a civilian employee, transferred from the Department of the Army to the Department of the Air Force. During her Army employment she was paid an LQA. She has acknowledged that she was not entitled to LQA as part of her Air Force employment. However, as a result of administrative error the allowance continued to be paid after her transfer.

In June 1977 the error was discovered and Mrs. Carlino was notified that her entitlement to LQA was in doubt. Mrs. Carlino states that in August 1977 her new Civilian Personnel Officer (CPO) informed her

that receipt of a LQA was not authorized. Efforts were made by her CPO to obtain a waiver of the prerequisites for LQA. The efforts were unsuccessful. However, the LQA payments continued during the efforts to locate the original documentation of her eligibility. On July 14, 1978, she received written notice that she was ineligible. Payments were discontinued. The total sum paid from the inception of her Air Force employment was \$10,812.39.

Discussion

The provision authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay and allowances, 5 U.S.C. § 5584 (1976), permits such waivers only when the collection of the erroneous payments would be against equity and good conscience and not in the best interests of the United States and only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, or any other person having an interest in obtaining the waiver.

We have consistently held that an employee who was aware of an erroneous payment when it occurred was not free from fault and is not entitled to relief under 5 U.S.C. § 5584. Clyde A. Finnell, B-199800, August 12, 1981; Beatrice M. Lansdown, B-201815, March 25, 1981; Marvin L. Peek, B-188803, June 15, 1977. The employee need not have had actual notice. Notice is present if, in light of all the circumstances, it is administratively determined that the employee should have known that an error existed. John J. Kafka, B-201819, July 24, 1981; Jon D. Lemmon, B-200450, June 18, 1981; Robert A. Turner, B-200116, March 23, 1981.

Mrs. Carlino's initial belief as to the accuracy of her pay, no matter how reasonable, is not itself a basis for waiver of the entire claim. Rather, the nature of her beliefs at the time of each payment must be examined to determine the amount of the claim that may be waived. See Marvin L. Peek, supra., and Kenneth J. Moore, B-185458, October 5, 1976.

The Claims Group determined that on or about June 6, 1977, Mrs. Carlino was notified that her eligibility was

in doubt. Mrs. Carlino contends that she was not notified until she received a letter dated August 10, 1977. However, that letter, which was from her Civilian Personnel Officer, supports the Claims Group's finding. It indicates that as of August 10, 1977, previous efforts had already been made on Mrs. Carlino's behalf by her Civilian Personnel Officer to preserve her eligibility for LQA. It also seems to indicate that Mrs. Carlino was aware of those efforts. The burden of proving that waiver is appropriate is on Mrs. Carlino. Rupert C. King, B-198760, April 27, 1981. Given the evidence in the record, we find that Mrs. Carlino has not proven her contention, and accordingly sustain the Claims Group's finding that she was on notice of her possible ineligibility for LQA by June 6, 1977,

Since the allowances paid prior to June 6, 1977, (\$4,495.42) were received by Mrs. Carlino in good faith, and with no knowledge that they were not correct, that portion of the claim was properly waived. In contrast, subsequent allowances (\$6,316.97) were received after she was advised in June 1977, that her eligibility was in doubt and in August 1977, that payment of a LQA to her was not authorized. She could no longer assume in good faith that the allowances could be retained. Kenneth J. Moore, supra. It became her responsibility to pursue the matter until a final determination of eligibility was made, and she should have either returned the allowances or set them aside in recognition that refund might later be required. John J. Kafka, supra.

Although Mrs. Carlino's financial capacities may be considered in arranging repayment (4 C.F.R. § 102.9-10 (1981)), the fact that repayment may cause financial hardship is not sufficient to authorize waiver. Jon D. Lemmon, supra; Harry A. Phillips, B-200296, November 28, 1980.

In conclusion, we hold that in such circumstances the employee is not entitled to waiver under 5 U.S.C. § 5584 (1976) of the overpayment in question because she was not entirely without fault.

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Accordingly, the action of the Claims Group in denying waiver of \$6,316.97 of the claim is sustained.

Milton J. Fowler
for Comptroller General
of the United States